IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILMINGTON SAVINGS FUND SOCIETY, FSB, Plaintiff,	)	
v.	)	C.A. No.: 08L-04-047 FSS
	)	**E-FILED**
SAINT ANNES CLUB, LLC, Defendant.	)	

Submitted: October 2, 2009
Decided: January 29, 2010

MEMORANDUM OPINION AND ORDER

Upon Movants' Motion to Set Aside Sheriff's Sale – *DENIED*

SILVERMAN, J.

This Motion to Set Aside Sheriff's Sale, stemming from a failed golf course development, has a complex history. The issue is whether certain neighboring homeowners were entitled to individual, written notice by certified mail of the sheriff's sale. The simple answer, under the circumstances, is no. Even if the movants were entitled to more formal notice, which they were not, movants have not shown prejudice, as they do not allege that they would have bid on the parcel.

I.

Middletown Greenways, LLC, conveyed property to Defendant, Saint Annes Club, LLC, on September 29, 2004. That day, Wilmington Savings Fund Society, FSB and Defendant entered into a mortgage and security agreement. After Defendant defaulted, WSFS foreclosed on April 11, 2008. On May 28, 2008, WSFS moved for default judgment, pursuant to Superior Court Civil Rule 55(b)(1), due to Defendant's failure to answer or appear. Judgment was subsequently entered against Defendant.

On August 1, 2008, WSFS's counsel mailed a "Notice to Lienholders and Tenants, Record Owners and Persons Having an Interest of Sheriff's Sale" by certified mail, with return receipts requested, explaining that a sheriff's sale of the undeveloped golf course was to take place on August 12, 2008. The notice was sent to the following: "Occupant/Tenant" at 1100 St. Annes Boulevard, Middletown,

Delaware 19709; Middletown Greenways, LLC; Department of Finance; Bernardon Haber Holloway Architects, PC; Saint Annes Development Associates LLC; WSFS; GL Cornell Company; and Saint Annes Club, LLC. Three days later, the notice was also posted on the common entrance door of a building on the Saint Annes property.

In an affidavit regarding the notice, WSFS's counsel stated that "the identity of lienholders and tenants has been ascertained by the following reasonably diligent efforts: Transnation Title Insurance Company, a certified title searching company, searched the following: records of the Recorder of Deeds of New Castle County; Judgment records in the Superior, Chancery and District Courts of Delaware; Addressing the Notice to 'Occupant/Tenant.'"

Also on August 1, 2008, counsel for WSFS informed the court that WSFS and Middletown Greenways, an intervening party, had settled. After the court entered an order on August 4, Defendant's counsel claimed that WSFS had failed to notify approximately 200 members of the Saint Annes Homeowner's Association, Inc., of the upcoming sheriff's sale.

On August 11, 2008, Eugene F. Kirchner, a member of the Saint Annes Homeowner's Association, filed a motion to set aside the sheriff's sale under Superior Court Civil Rule 69(g). On August 12, 2008, Defendant filed for bankruptcy under Chapter 11 of the Bankruptcy Code, resulting in a temporary stay of the instant

lawsuit. The bankruptcy proceeding was dismissed on June 23, 2009, and the sheriff's sale was rescheduled for August 11, 2009.

Once the sheriff's sale was rescheduled, WSFS's counsel sent notice almost identical to the previous "Notice to Lienholders and Tenants, Record Owners and Persons Having an Interest of Sheriff's Sale" on July 22, 2009. In this second notice, WSFS notified several additional companies, and "Occupant/Tenant" at 150 Wiggins Mill Road, Townsend, Delaware 19734. The August 11, 2009 sheriff's sale was held, and WSFS was the only bidder, bidding $1,250,000.00. Movants have not alleged that they would have bid against WSFS, much less that they would have topped the WSFS bid.

On August 21, 2009, Kirchner, on his behalf and on behalf of "certain similarly-situated homeowners, including John Ledden, Sam Peppelman, Joel Ashkenase, and Bud Moore," filed an amended motion to set aside the sheriff's sale. After a hearing on September 8, 2009, Kirchner and Ledden filed a supplemental memorandum.

II.

The deed from Middletown Greenways to Defendant states that "[t]he lands and premises being conveyed herein are . . . subject to a Declaration of Covenants, Conditions and Restrictions[.]" This Declaration, dated September 30,

2004, states in pertinent part:

> The Owner . . . of a Lot shall be a Resident Social Member (as defined by the Club Declarant in its Membership Plan) of such Golf Club to be developed by the Club Declarant. . . . As a Resident Social Member of the Golf Club, the Owner of each Lot shall be entitled to use only of those Golf Facilities that are available for dining and beverages in accordance with the Membership Plan (but not any other Golf Facilities) and shall be subject to the usage charges and/or prices imposed by the Golf Club for the use of the clubhouse facilities.

The Declaration continues:

> Club Declarant, its successors or assigns or other parties or entities may from time to time provide Golf Facilities are [sic] adjacent to the Lots (including without limitation a golf course, practice facility clubhouse, tennis courts and swimming pool), which are separate from any and all common areas within the Property.

Notably, the Declaration further states: "Ownership of a Lot does not give any vested right or easement, prescriptive or otherwise, to use the Golf Facilities and does not grant any ownership or membership interest in the Golf Facilities."

Furthermore, when applying for membership to The Saint Annes Club, applicants signed a membership agreement and paid a fee of $20,000. The agreement states in pertinent part:

> The undersigned hereby acknowledges and understands that The Saint Annes Club, LLC, doing business as The Saint Annes Club (collectively, the "Club"), will own the

> Club Facilities to be provided at The Saint Annes Club. The undersigned further acknowledges that Membership to the Club permits the undersigned to use the Club Facilities, but is not an investment in the Club or the Club Facilities provided at The Saint Annes Club, nor does Membership confer on the undersigned any equity or ownership interest or any other property interest in the Club or the Club Facilities provided at The Saint Annes Club. The undersigned only obtains a non-exclusive revocable license to use the Club Facilities provided at The Saint Annes Club in accordance with the Membership selected and the terms and conditions of the Membership Plan and Rules & Regulations, as it may be amended from time to time.

III.

Movants contend that "[a]s the owners of lots covered by the Declaration [of Covenants, Conditions and Restrictions], the Homeowners are the beneficiaries of certain restrictive covenants contained in the Declaration and are vested with certain rights and easements to use the Property." Accordingly, movants claim that because they "had both equitable and legal interests in the Property that ran with the land, they were entitled to actual notice of the Sheriff's Sale under Superior Court Rule 69(g)(4)."[1]

In response, WSFS contends that "[n]otice was sent to the lienholders and owner of the golf course." WSFS further claims that "[t]he golf club members and homeowners have neither an equitable or legal interest of record in the property

[1] *See* Super. Ct. Civ. R. 69(g)(4).

upon which WSFS is foreclosing and are, therefore, not entitled to receive notice of the sheriff's sale under the rule." Alternatively, WSFS asserts that, even if movants were entitled to notice, "the Movants had actual knowledge of the Sheriff's Sale." As WSFS points out, Kirchner stated in an affidavit, dated August 11, 2008, that he "became aware of the proposed sheriff's sale of land still under development by Saint Anne's [sic] Club, LLC for a third golf course when [he] spoke with one of [his] neighbors several weeks ago." Kirchner contends, however, that he did not receive "formal notice[.]"

WSFS also contends that "[t]he identities (and addresses) of the individuals . . . are not known, and cannot be known or reasonably ascertained by a creditor based on the public records or elsewhere." WSFS asserts that "the real property itself was also posted with the required Notice[,]" and that "many homeowners in the surrounding areas were also given actual notice of the Sheriff's Sale (and WSFS' intentions) at a meeting on July 9, 2009."

IV.

"The Superior Court has broad discretion to confirm or set aside a sheriff's sale. This equitable power derives from the inherent control of the court

over its own process 'for the correction of abuses or the prevention of injury."[2] "When the Superior Court reviews a sheriff's sale, . . . it must ascertain whether there was 'some defect or irregularity in the process or mode of conducting the sale, or . . . neglect of duty, or misconduct on the part of the Sheriff or some other sufficient matter . . . whereby the rights of parties to, or interested in the sale are, or may have been, prejudiced."[3] As a matter of law, failure to give notice to an interested party may amount to a fatal defect or irregularity in the process.[4] But, a defect is not necessarily fatal in every case.

Superior Court Civil Rule 69(g) states:

> No sheriff's sale of real estate shall be held unless at least seven (7) days before the sale the plaintiff or his counsel of record shall send by certified mail, return receipt requested to . . . persons having an equitable or legal interest of record . . . at least thirty (30) days prior to such sale a notice consisting of a Notice to Lien Holders, Tenants, Record Owners and Persons Having an Interest of Sheriff's Sale of Real Estate . . . and a copy of the advertisement of

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[2] *Greenpoint Mortgage Funding, Inc. v. McCabe*, 2006 WL 3604784, at *1 (Del. Super. Nov. 27, 2006), *aff'd*, *Pac. West Group, Inc. v. Greenpoint Mortgage Funding, Inc.*, 2007 WL 2457556 (Del. Supr. Aug. 28, 2007).

[3] *Burge v. Fid. Bond & Mortgage Co.*, 648 A.2d 414, 419 (Del. 1994) (quoting *Petition of Adair*, 190 A. 105, 107 (Del. Super. 1936)); *see also Household Bank, F.S.B. v. Daniels*, 2005 WL 1953035, at *2 (Del. Super. July 14, 2005).

[4] *Daniels*, 2005 WL 1953035, at *2 ("Failure to provide notice of sale, either through the Sheriff or through advertising the sale 'are perhaps among the most usual grounds on which sales are set aside.'").

> the sale posted in accordance with § 4973 of Title 10. . . . The notice shall be addressed to persons having an equitable or legal interest of record at the last known available or reasonably ascertainable address of such person[.] . . . No sheriff's sale shall be held in such action unless the plaintiff or his counsel of record or a representative of the plaintiff or his counsel of record shall file with the Court and deliver to the sheriff conducting the sale a copy of proof of the mailing and posting of such notice which shall consist of the usual receipt given by the post office of mailing to the person mailing the certified article and a copy of the Notice to Lien Holders, Tenants, Record Owners and Persons Having an Interest mailed with such notice together with an affidavit made by plaintiff or his counsel of record[.]

Typically, the issue of whether there was a potential lack of notice under Rule 69(g) arises regarding lienholders and record owners of property.[5]

V.

As presented above, the membership agreement states that membership in the Club does not "confer on the undersigned any equity or ownership interest or any other property interest in the Club or the Club Facilities provided at The Saint Annes Club. The undersigned only obtains a non-exclusive revocable license to use

[5] *See, e.g., McCabe*, 2006 WL 3604784 (analyzing whether Rule 69(g)'s notice requirement was satisfied for a lienholder); *Daniels*, 2005 WL 1953035 (regarding record owner of property); *PNC Bank, N.A. v. GMAC Mortgage Corp.*, 2004 WL 1427019 (Del. Super. June 16, 2004) (regarding lienholder); *New Castle County v. Gallen*, 2003 WL 21739069 (Del. Super. May 27, 2003) (regarding home owners); *Fortunato Constr. Co., Inc. v. Juvenile Awareness Educ. Program, Inc.*, 1992 WL 91137 (Del. Super. Apr. 13, 1992) (regarding lienholders).

the Club Facilities[.]" Furthermore, the Declaration clearly states: "Ownership of a Lot does not give any vested right or easement, prescriptive or otherwise, to use the Golf Facilities and does not grant any ownership or membership interest in the Golf Facilities." This clear language means that movants do not have a property interest–equitable, legal, or otherwise–in the land on which the golf course was to be built.

Notwithstanding the documents, movants argue that they are "the beneficiaries of certain restrictive covenants contained in the Declaration and are vested with certain rights and easements to use the Property." Specifically, movants claim that provisions contained in the Declaration "create an affirmative obligation on the part of the owner to develop the land as a golf course for the benefit of the Homeowners, and prohibit any other use of the Property."

First, the law disfavors restrictions on land.[6] And, as to that, movants' view of the Declaration is particularly problematic. Moreover, while the Declaration contemplated that the golf course would be built for use by golf club members, it does not follow that, *ipso facto*, the members had any interest in the land warranting notice by certified mail in the event of a sheriff's sale. Finally, apart from any

[6] *1.77 Acres of Land v. State ex rel. State Highway Dep't*, 241 A.2d 513, 515 (Del. 1968).

benefits the Declaration bestows on movants, the Declaration, by its terms, does not amount to a restrictive covenant running with the land. The Declaration appears to have been drafted so as to preclude the claims that movants are making here.

VI.

Even if movants had a cognizable interest in the non-existent golf course's land, which they do not, they were on notice of both sheriff's sales. First, as presented above, Kirchner admitted it in his affidavit. Second, notice was posted on the entrance of a building at Saint Annes before each sheriff's sale. Third, albeit least significantly, the notice was mailed via certified mail to "Occupant/Tenant" at the Saint Annes property before each sheriff's sale. Taking all of this into account, the movants, particularly Kirchner, knew in advance that the sheriff's sales were to take place.

Finally, and most importantly, movants have not alleged that they suffered real prejudice by any infirmity in the process.[7] Movants do not contend that they would have been ready, willing, and able to out-bid WSFS had they received timely notice by certified mail. Nor do they allege other, specific prejudice. Thus,

[7] *See Felton Bank v. Wicks*, 1998 WL 283377, at *2 (Del. Super. Feb. 3, 1998) (holding that a sheriff's sale could not be set aside "on the mere speculative possibility that there may have been prejudice[]").

it cannot be said that sending movants notice by certified mail of the August 2009 sheriff's sale would have made a difference. Holding a new sale would not correct an injury or abuse to movants. Accordingly, setting aside the sale will not be in anyone's interest.

VII.

For the foregoing reasons, the motion to set aside the sheriff's sale is **DENIED**. The sale is **CONFIRMED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (civil)
William D. Sullivan, Esquire
Curtis J. Crowther, Esquire